Editor's note: Reconsideration denied by Order dated Aug. 12, 1992

RICHARD C. BEHNKE

IBLA 89-352 Decided January 27, 1993

Appeal from a decision of the District Manager, Richfield District, Utah, Bureau of Land Management, requiring rehabilitation of wilderness study area affected by unauthorized mining operations. U MC 80833 through U MC 80873.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Assessment Work--Federal Land Policy and Management Act of 1976: Plan of Operations--Federal Land Policy and Management Act of 1976: Wilderness--Mining Claims: Assessment Work--Mining Claims: Plan of Operations

   Where, in the absence of an approved plan of operations, a mining claimant cuts live trees in the course of road improvement activities on his mining claims, which are situated within a wilderness study area, and the impact of such activities exceeds in manner and degree the activities on the claims on Oct. 21, 1976, or temporarily suspended on that date, and impairs the suitability of the land for preservation as wilderness, BLM properly requires him to immediately rehabilitate the impact of thos

APPEARANCES: Richard C. Behnke, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Richard C. Behnke has appealed from a decision of the Richfield District Manager, Bureau of Land Management (BLM), dated March 9, 1989, requiring rehabilitation of the area affected by his unauthorized mining operations within the Mt. Hillers Wilderness Study Area (WSA) (UT-050-249).

The present case involves 40 lode mining claims and a millsite, all located prior to October 21, 1976 (the date of enactment of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1701-1784 (1988)). 1/ According to the record, the claims are presently owned by Richard C. and Eva J. Behnke.

1/ The claims are known as the Happy Bottom Nos. 1 through 12, Eva J. Nos. 1 through 5, Henry C. Nos. 1 and 2, Ann B. No. 1, Judy Nos. 1, 2, 10 through 27, and the Mill Site (U MC 80833 through U MC 80873) and are

The record indicates that the Henry Mountain Resource Area Office, Utah, BLM, was initially approached in August 1988 with a verbal proposal for the performance of annual assessment work on the subject mining claims. Because the proposal involved the use of mechanized earth-moving equipment, the Acting Area Manager notified Behnke, by letter dated August 9, 1988, that he was required to submit a plan of operations, which would be reviewed to determine the "impact of the disturbance to the WSA to fulfill the mandate [under FLPMA] of preventing unnecessary or undue degradation to the lands and their resources." Until submission of a plan and subsequent review by BLM, the Acting Area Manager stated that Behnke was "prohibited from commencing with the proposed assessment work."

On August 10, 1988, Behnke submitted a plan of operations to the resource area office. Therein, he proposed only to undertake "maintenance work" on the existing 3.5 miles of roads and trails providing access to the subject mining claims, 2/ stating: "This will consist of minor grading and leveling of these roads which will facilitate the use of them for the purpose intended. This work will be performed by a small 'Cat' (D-6) and manual labor." Behnke stated that the work would commence August 20, 1988, and take approximately 30 days to complete.

Thereafter, BLM received two attachments to Behnke's plan of operations on August 12 and 15, 1988. In those attachments, Carl Hunt, Behnke's designated operator, proposed additional activities to follow completion
of the necessary road work. He proposed to "[c]onstruct" six new trails
to obtain access for the purpose of drilling from 75 to 100 holes, up to 150 feet in depth, in order to test for mineralization. Further, he proposed to explore for mineralization "by means of auger drilling, hand sampling and geological work," using an "air compressor, small loader and hand tools." Finally, he proposed "[c]leaning up and producing ore from existing workings," which consisted of two mine shafts and two tunnels.

By letter dated September 14, 1988, the Acting Area Manager notified Behnke that his plan of operations was being reviewed and that this process could take up to 90 days under 43 CFR 3802.1-5. 3/ He further stated that, in accordance with 43 CFR 3802.3-1, an environmental assessment (EA) would be prepared.

BLM prepared the Mt. Hillers Mining Plan EA on October 4, 1988. In the EA, BLM analyzed the environmental impact of the proposed exploration

fn. 1 (continued)
situated in secs. 28, 29, and 33, T. 33 S., R. 11 E., Salt Lake Meridian, Garfield County, Utah, within the 20,000-acre Mt. Hillers WSA. The record indicates that the claims were located in 1955, 1957, 1958, and 1964.

2/ Part of the access consisted of a cherry-stemmed road and part consisted of trails continuing on from the end of that road.

3/ The Acting Area Manager specifically stated that "[a]dditional time, not to exceed 60 days, will be required to complete the evaluation of your plan of operations," thus invoking the 60-day extension provided for by 43 CFR 3802.1-5(d)(3).

and mining activities, including improvement of the existing access roads and construction of the new trails, as well as three alternatives to that action.

In particular, in order to determine the impact to "wilderness values," BLM analyzed whether the proposed action would satisfy the "non-impairment standard," concluding that the standard would not be satisfied. Specifically, BLM concluded that, given the steep nature of the terrain, shallow soils, and moderate precipitation, the proposed activities would cause impacts which were not capable of being reclaimed to a condition
of being substantially unnoticeable in the WSA as a whole by the time
the Secretary of the Interior was scheduled to send his recommendation
to the President regarding designation of the WSA as a wilderness area (September 30, 1990).

The EA was approved by the District Manager on October 11, 1988. Copies of the EA were then mailed to various interested parties though, apparently through oversight, no copy was sent to Hunt or Behnke. Notice
of preparation of the EA was, however, published in the Federal Register (53 FR 41246 (Oct. 20, 1988)). On October 21, 1988, the Utah State Director approved the recommendations of the Area Manager and the District Manager that Behnke's proposed exploration and mining operations not be allowed because such operations would not satisfy the non-impairment standard. See Decision/Record Rationale. Under this recommendation, only hand work and nonmechanized activity would be permitted. Id.

On November 1, 1988, before issuance of a formal decision rejecting
the plan of operations, a field examination disclosed that the trail in sec. 33 had been cleared of trees and deadfall by chainsaw. BLM employees had earlier discovered that the road had been bladed in secs. 28 and 29.
On November 10, 1988, the State Director issued a trespass notice to Hunt for blading and cutting and removing trees from a trail within the WSA, in violation of 43 CFR 3802.4-1 and 9265.5(d)(2). Hunt was ordered to immediately cease committing the violations. A copy of this trespass notice was also served on Behnke.

By separate decisions dated December 12, 1988, addressed to Behnke
and Hunt, respectively, the District Manager denied the proposed plan of operations because the EA had shown that the land could not be "substantially reclaimed by September 30, 1990," in fulfillment of the non-impairment standard. Nevertheless, the District Manager stated that "casual use activities" could be carried out and that deferment of the assessment work requirement could be sought. There is no indication in the record that either Behnke or Hunt filed an appeal from the District Manager's December 1988 decisions, despite having been served with copies of those decisions.

In order to assess the environmental impact of rehabilitating the disturbances caused by the unauthorized road improvement activities within the Mt. Hillers WSA, BLM prepared the Mt. Hillers Trespass Rehabilitation
Plan EA on December 16, 1988. In the EA, BLM initially reviewed the extent of damage caused to the WSA by these activities. BLM noted that while the road through sec. 29 and part of sec. 28 had been cherry-stemmed, and thus

excluded from the WSA, the grading of the road had widened it so that it now protruded into the WSA, resulting in the destruction of saplings, trees, and other vegetation. Furthermore, a 617-foot segment of trail in sec. 28 which was within the WSA had been graded and a three-quarter-mile segment of the trail in sec. 33, also within the WSA, had been cleared of all trees greater than 2 inches in diameter by chain saw. See Rehabilitation Plan EA at 4-6.

BLM analyzed a proposed action and several alternatives for rehabilitating the area within the WSA disturbed by the unauthorized road improvement activities. In its proposed action, BLM proposed to remove the cut vegetation from the sides of the cherry-stemmed road in secs. 28 and 29, to remove the downed trees from and to recontour the road in sec. 28, and to pull the cut trees and deadfall back onto the road in sec. 33. BLM concluded that such rehabilitation would not make the disturbance to the land substantially unnoticeable by September 30, 1990, but that the land would be recovering.

The EA was approved by the District Manager on December 20, 1988. Copies of the EA were then mailed to various interested parties and notice of preparation of the EA was published in the Federal Register (53 FR 52835 (Dec. 29, 1988)).

In a Decision Record, dated December 20, 1988, the District Manager decided to provide for removal of cut trees and brush from the sides of the road in secs. 28 and 29, removal of downed trees from and recontouring the road in sec. 28, 4/ and placing cut trees and deadfall back on the road in sec. 33.

By letter dated December 22, 1988, BLM provided Behnke with a copy of the Rehabilitation Plan EA and the December 1988 Decision Record. On January 12, 1989, Behnke filed a "rebuttal" to the November 1988 trespass notice, as well as the Rehabilitation Plan EA and the subsequent Decision Record. Behnke argued that no trespass had occurred and, therefore, no rehabilitation need take place because the activities conducted on the subject mining claims during 1988 were "permitted by law" either because they were "grandfathered uses," exempt from the non-impairment standard, or because the claims constituted valid existing rights which authorized his actions. In particular, Behnke noted, the activities cited as violations were similar to activities conducted on the claims prior to the enactment of FLPMA, referring to affidavits of labor performed on the claims dating from 1955.

By identical decisions dated February 24 and March 9, 1989, addressed, respectively, to Hunt and Behnke, the District Manager, noting that they had trespassed within the Mt. Hillers WSA when they undertook activities under the proposed plan of operations without prior approval, required them

4/ The Decision Record erroneously states that the downed trees were to be removed and the trail recontoured in sec. 29. However, the Rehabilitation Plan EA indicates, at page 4, that the damage to the WSA, which the rehabilitation plan seeks to correct, occurred in sec. 28.

to rehabilitate the surface disturbances caused thereby. Specifically, the District Manager required them to remove the cut trees and brush from thesides of the road in secs. 28 and 29, to remove downed trees from and recontour that part of the trail in sec. 28 which was within the WSA and to place the cut trees and deadfall back on the trail in sec. 33. The District Manager required the rehabilitation to begin by May 15, 1989, if the weather permitted, and to be completed within 30 days. Referring to Behnke's January 1989 letter, the District Manager stated that "[t]his decision does not address your possible grandfathered use, instead this decision addresses your unauthorized mineral entry into the Mt. Hillers WSA, which constitutes a trespass." Behnke has appealed from the District Manager's March 1989 decision. 5/

In his statement of reasons for appeal, appellant reiterates his contention that he was not required to obtain approval of a plan of operations before conducting the "road maintenance work" performed in 1988 because such work constituted a "grandfathered use." Thus, he argues, he cannot be required to rehabilitate any damages relating to the grading and blading of the road. Specifically, he states that the work which Hunt performed "did not exceed the extent or type of work that had been performed during previous years."

The land involved herein was inventoried as having wilderness characteristics and, accordingly, designated a WSA pursuant to section 603(a) of FLPMA, 43 U.S.C. § 1782(a) (1988). 6/ That section requires that the Secretary review such areas for possible preservation as wilderness within 15 years after October 21, 1976, and make recommendations to the President regarding the suitability or nonsuitability of each such area for preservation as wilderness.

[1] During the period of this review, section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1988), instructs the Secretary "to manage such lands * * * in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining * * * uses * * * in the manner and degree in which the same was being conducted on October 21, 1976." (Emphasis added.) Section 603(c) of FLPMA, thus, provides that "existing mining uses" may continue in the same manner and degree as they were being conducted on October 21, 1976, even where they will impair the suitability of the land for preservation as wilderness. See 43 CFR 3802.0-6; Robert L. Baldwin, Sr., 116 IBLA 84, 87 (1990). Thus, the statute provides for the continuation of what BLM has termed "grandfathered uses." See Interim Management Policy and Guidelines

5/ No appeal has been filed by Hunt from the District Manager's February 1989 decision.
6/ While appellant argues that, at one time, BLM regarded the Mt. Hillers WSA as not suitable for preservation as wilderness, this fact is of no moment. Until Congress acts on recommendations to include or exclude land determined to be within a WSA from the permanent wilderness system, section 603(c) of FLPMA and its implementing regulations remain applicable. See Robert L. Baldwin, Sr., 116 IBLA 84, 88 (1990); John Loskot, 71 IBLA 165, 167-68 (1983).

for Land Under Wilderness Review (IMP), 44 FR 72014, 72015 (Dec. 12, 1979). Such "grandfathered use" may, of course, be regulated to prevent "undue or unnecessary degradation" of the public lands.

In order to prevent, or at least minimize impairment of the suitability of WSA's for preservation as wilderness by activities authorized under the mining laws, the Department promulgated the regulations in 43 CFR Subpart 3802. Those regulations generally provide for the submission and approval of a plan of operations prior to conducting mining operations within a WSA. 7/ See 43 CFR 3802.1-4 and 3802.1-5.

The regulations, however, provide a limited exception to the requirement to submit and obtain approval of a plan of operations prior to initiating mining activities. In relevant part, 43 CFR 3802.1-3 provides that
a plan "shall not be required for operations that were being conducted on October 21, 1976, unless the operation is undergoing changes that exceed the manner and degree of operations on October 21, 1976."

In his March 1989 decision, the District Manager expressly declined to examine appellant's assertion that his activities constituted the exercise of grandfathered uses. Instead the District Manager premised his decision on the failure of appellant to obtain prior authorization from BLM for those actions. However, if appellant's activities had constituted grandfathered uses, he would not have been required to obtain approval of a plan of operations under 43 CFR 3802.1-3. Thus, the question of whether these activities constituted grandfathered uses is critical to determining the propriety of the District Manager's March 1989 decision. We will, therefore, review that question under our de novo review authority.

In order to avail himself of the exception provided by 43 CFR 3802.1-3, however, an individual must affirmatively establish that the work performed constituted a grandfathered use within the meaning of section 603(c) of FLPMA. Appellant argues that his activities "did not exceed the extent or type of work that had been performed during previous years." In support of this assertion, he points to the affidavits of labor filed each year since 1955.

In determining whether appellant is entitled to take advantage of the relevant language of 43 CFR 3802.1-3, we must first focus on the activities
that were actually occurring "on October 21, 1976." See IMP, 44 FR 72016 (Dec. 12, 1979); State of Utah v. Andrus, 486 F. Supp. 995, 1006 (D. Utah 1979); Murray Perkins, 116 IBLA 288, 294 (1990); Doyle Cape, 79 IBLA 204, 207 (1984). And, while October 21, 1976, is the critical date, the IMP also permits advertence to activities occurring during the preceding year which were "temporarily inactive" at that date (see IMP I.B.6.b., 44 FR

7/ Mining operations are defined by regulation to include, in addition to prospecting, development, extraction, and processing of mineral deposits, "construction and maintenance of means of access to and across [WSA] lands." 43 CFR 3802.0-5(f).

72019) and which subsequently recommenced and continued to the present following "the logical pace and progression of development" (see IMP I.B.6.c., 44 FR 72019).

We recognize that, prior to October 21, 1976, appellant bladed the access road, thereby undoubtedly cutting live trees, when he originally built the various segments of the road, as is evident from the affidavits of labor submitted for the 1956, 1959, and 1961 assessment years. However, in determining whether, in the absence of an approved plan of operations, mining operations are permitted within a WSA, we are concerned only with whether the impact of such operations differs in manner and degree from
that of operations taking place on October 21, 1976, or which might have been temporarily suspended on that date but which was occurring within the 12 months preceding October 21, 1976. 8/ Thus, we will not consider the manner and degree of mining operations prior to October 21, 1976, except
to the extent activities occurring within the preceding year may have been temporarily suspended. We, thus, look to the affidavit of labor performed during the period between September 1, 1976, and August 30, 1977. That affidavit states in full that the work performed consisted of: "[C]learing access roads of fallen timber, rock & debris, and repairing damage caused by erosion to same. Blasting and digging at various sites to remove overburden and make contact with ore bodies. Excavating old mine shafts & drifts and mining ore." 9/ (Emphasis added.) To similar effect was the affidavit of labor provided the previous year.

We conclude that the impact of the road work which resulted in issuance of the November 1988 trespass notice exceeded in manner and degree
the impact of the operations existing on October 21, 1976. While we recognize that the access road was cleared of deadfall in sec. 33 in 1988,
much as it may have been on October 21, 1976, the noticeable difference
in 1988 was that the perimeter of the road in secs. 28 and 29 was bladed, with the resulting destruction of live trees, and live trees were also cut in sec. 33. There is simply no evidence in the affidavit or elsewhere that

8/ The affidavit, of course, does not reveal what specific activities were being conducted on Oct. 21, 1976. However, for purposes of the present decision, we will assume that all of the reported activities were being so conducted on that date.
9/ In promulgating the regulations, the Department expressly rejected requests that it define grandfathered uses as those occurring "on or before October 21, 1976." (Emphasis added.) The regulatory preamble noted that:
"This change has not been adopted but the interim management policy clearly interprets 'on October 21, 1976,' to include those operations that might have been temporarily inactive on that specific date if the period
of inactivity did not exceed twelve months. This rulemaking will be interpreted in the same way as the guidance set out in the interim management policy and will include those operations that might have been temporarily inactive on October 21, 1976."
45 FR 13970 (Mar. 3, 1980).

the road was bladed, thus destroying live trees, or that trees were cut on October 21, 1976. 10/ Further, it appears that a 600-foot section of the trail within the WSA was bladed in 1988. This increased impact was clearly of a physical and aesthetic nature. See Solicitor's Opinion, 86 I.D. 89, 115-16 (1979).

We also note that "[m]anner and degree" is defined in 43 CFR 3802.0-5(j) to encompass a

> change in the kind of activity if the impacts from the * * * change of activity are not of a significantly different kind than the existing impacts. * * * [T]he significant measure for these activities is still the impact they are having on the wilderness potential of an area. * * * [A] rule of reason will be employed.

See also IMP, 44 FR 72019 (Dec. 12, 1979).

The blading and cutting of live trees did have a "significantly different kind" of impact on the wilderness potential of the Mt. Hillers WSA than clearing the road of fallen timber and debris or repairing erosion damage in the road, under operations existing on October 21, 1976. Indeed, the Rehabilitation Plan EA, at pages 14-15, indicates that the former activities have impaired the suitability of this land for preservation as wilderness in those areas where the impacts cannot be reclaimed to the point of being substantially unnoticeable by September 30, 1990. See 43 CFR 3802.0-5(d). That was certainly not true of the mere removal of fallen timber and debris from and the repairing of erosion damage in the road. 11/ Thus, we must conclude that the cutting of live trees did

10/ That the road work performed in 1988 exceeded in manner and degree the operations conducted on Oct. 21, 1976, thus requiring an approved plan of operations, is further borne out by the fact that the improvement or maintenance of access facilities so as to alter the width of such facilities and the destruction of trees more than 2 inches in diameter at the base, both of which occurred here (see Rehabilitation Plan EA at 3, 5), each independently requires an approved plan. See 43 CFR 3802.1-1; William E. Godwin, 82 IBLA 105, 107 (1984).

11/ We do not mean to suggest that because the activities on appellant's mining claims occurring in 1988 were found to impair the suitability of the land for preservation as wilderness that this automatically meant that such activities could not be considered grandfathered uses. Indeed, it is clear that such grandfathered uses can be those which impair suitability. Rather, it is the change in the impact on wilderness potential occasioned by appellant's 1988 activities, as compared to that occasioned by the uses existing on Oct. 21, 1976, that causes such activities not to constitute grandfathered uses. As the court stated in Rocky Mountain Oil & Gas Association v. Watt, 696 F.2d 734, 749 (10th Cir. 1982):

"The purpose of the WSA management scheme is to maintain the status quo existing October 21, 1976, so that lands then suitable for wilderness consideration will not be rendered unfit for such consideration before the Secretary makes a recommendation and the Congress acts on the

not constitute a grandfathered use occurring on October 21, 1976, or temporarily inactive at that date. In light of this finding, we need not examine the question whether, assuming such activities were existing as of the critical date, they have continued since then, "following the logical pace and progression of development," such as would permit their allowance at the present time.

Appellant does not deny that he caused the road work, which formed the basis for the November 1988 trespass notice, to be performed. Inasmuch as we have determined that such work exceeded in manner and degree appellant's operations on October 21, 1976, he was required to obtain approval of a plan of operations prior to commencing the work because such work did not constitute a grandfathered use under 43 CFR 3802.1-3. See Havlah Group, 60 IBLA 349, 357-58, 88 I.D. 1115, 1119-20 (1981). Performing the work in the absence of an approved plan, thus, constituted a violation of Departmental regulations and was a trespass per se.

Where noncompliance with the regulations is causing an impairment of the wilderness suitability of the land, BLM is required by 43 CFR 3802.4-1(b) to issue a notice of noncompliance, specifying therein the "actions which shall be taken to correct the noncompliance." 43 CFR 3802.4-1(c). In the present case, as noted above, BLM concluded in its Rehabilitation Plan EA, at pages 14-15, that the road work had impaired the wilderness suitability of the affected land where all of the impacts of that work could not be returned to a substantially unnoticeable condition by September 30, 1990. See Eugene Mueller, 103 IBLA 308 (1988) (area of steep slopes, shallow soils, and low precipitation). Appellant has not challenged this conclusion. Accordingly, in the absence of any evidence to the contrary, we must conclude that BLM was required by 43 CFR 3802.4-1(b) to issue a notice of noncompliance, specifying therein appropriate corrective measures. See L. C. Artman, 98 IBLA 164, 168-69 (1987). That notice is contained in the District Manager's March 1989 decision. 12/

Appellant's alternative argument that he was authorized to engage in the road work in 1988 without prior approval of a plan of operations because the subject mining claims constitute "valid existing rights" is also unavailing. It is true that section 701(h) of FLPMA, P.L. 94-579, 90 Stat. 2786 (1976), provides that all actions of the Secretary are

fn. 11 (continued)
recommendation under section 603(a) and (b)." To allow appellant to cut live trees as a part of his mining operations, thus impairing the suitability of the Mt. Hillers WSA, where that suitability was not impaired as a result of any such activity as of Oct. 21, 1976, clearly does not maintain the status quo so far as such suitability is concerned and, thus, cannot be allowed as a grandfathered use.

12/ In addition, 43 CFR 9265.5(d)(2), cited along with 43 CFR 3802.4-1 in the November 1988 trespass notice, makes the responsible party liable for the cutting or destruction of "any tree growing, standing, or being upon any land of the United States which, in pursuance of law, has been reserved * * * by the United States for any public use."

"subject to valid existing rights." In the case of mining operations within a WSA, such rights are defined by the Department to mean that a "discovery had been made on a mining claim on October 21, 1976, and continues to be valid at the time of exercise." 43 CFR 3802.0-5(k). However, even assuming that the subject mining claims are supported by a discovery of a valuable mineral deposit and thus might be deemed to be valid existing rights, 13/ there is nothing in the regulations which indicates that the valid existing rights status of mining claims thereby dispenses with the need to obtain approval of a plan of operations before the commencement of mining operations. The contrary is true. Indeed, 43 CFR 3802.1-5(b)(2) clearly presupposes that prior approval of a plan of operations is required even for a plan "covering operations on a claim with a valid existing right." See also IMP, 44 FR 72031 (Dec. 12, 1979), as amended, 48 FR 31856 (July 12, 1983). Thus, even if appellant had made the requisite showing to establish the existence of a discovery as of October 21, 1976, which he has not, he would still have been required to obtain approval of a plan of operations before commencing the actions undertaken on the claims. 14/

Therefore, we conclude that the District Manager properly required appellant to rehabilitate the damages caused by his unauthorized operations on the subject mining claims within the Mt. Hillers WSA, where they were impairing the suitability of preservation of the land as wilderness. See Murray Perkins, supra at 297; William E. Godwin, 82 IBLA 105 (1984).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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James L. Burski
Administrative Judge

I concur:

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C. Randall Grant, Jr.
Administrative Judge

13/ Generally speaking, a mining claimant will be required to make at least a preliminary showing that he has made a discovery of a valuable mineral deposit within the mining claim and, thus, that his claim constitutes a valid existing right. See Havlah Group, supra at 361, 88 I.D. at 1121. Appellant has not done this.

14/ While it is somewhat paradoxical that claims which might be judged supported by valid existing rights are required to obtain approval of a plan of operations while the mere continuation of grandfathered uses does not require approval of a plan, it must be remembered that grandfathered uses were only those uses actually occurring on Oct. 21, 1976, or which were temporarily suspended on that date but which had occurred in the preceding 12 months. See note 9, supra. It was, thus, designed to be an exception of very limited scope.